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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TULARE, VISALIA DIVISION

In re SEARCH WARRANT 013487 EXECUTED AUGUST 22, 2018 AT JPMORGAN CHASE BANK

YORAI BENZEEVI,

Moving Party,

v.

SUPERIOR COURT OF THE COUNTY OF TULARE

Respondent,

TULARE COUNTY DISTRICT ATTORNEY'S OFFICE,

Real Party in Interest.

Case No.

DR. YORAI BENZEEVI'S SURREPLY TO MOTION FOR RETURN OF SEIZED PROPERTY AND RELATED EVIDENTIARY HEARING AND SUPPORTING DECLARATION OF BEVAN A. DOWD

Date: November 9, 2018
Time: 2:00 p.m.
Dept.: 13
Judge: Hon. John P. Bianco

PUBLIC – Redacts Materials from Conditionally Sealed Record

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I. INTRODUCTION

This Court should grant Dr. Yorai Benzeevi's Motion for Return of Seized Property ("the Motion")—and while no evidentiary hearing is needed to arrive at that conclusion, the State has conceded that such an evidentiary hearing would be required to conclude the opposite. The State has seized Dr. Benzeevi's property, and to justify that seizure, it must prove by a preponderance of the evidence that the seized funds were "stolen or embezzled." *See* Cal. Penal Code § 1524; *People v. Super. Ct. (McGraw)*, 100 Cal. App. 3d 154, 159 (1979). This is a legal standard that is mandated by due process, the presumption of innocence, and Evidence Code § 637—which provides that "[t]he things which a person possesses are presumed to be owned by him." The State cannot satisfy this standard here because it is not possible—as a matter of accounting or logic—to trace the seized funds to the alleged crime. Recognizing this, the State invokes inapposite case law from other legal contexts, such as federal ***post-conviction*** forfeiture statutes. But such cases are inconsistent with the legal standards that apply here in the pre-indictment context—*i.e.*, the State's burden of proof, the presumption of innocence, and the presumption of ownership. Thus, Dr. Benzeevi's motion should be granted, with or without a hearing.

As noted above, should the Court decline to grant Dr. Benzeevi's motion on the papers, we agree with the State that an evidentiary hearing must be granted for at least two reasons. ***First***, an evidentiary hearing would be required to protect Dr. Benzeevi's due process rights. *McGraw*, 100 Cal. App. 3d at 159. At this point, the State has not submitted a shred of evidence justifying the seizure.

Second, recently revealed information raises the serious prospect that the State misled this Court when submitting its search warrant application. Two weeks ago, pursuant to an Order of this Court, the State produced the affidavit it submitted to secure the search warrant. The affidavit contains recklessly false and misleading statements and omits critical facts. Under these circumstances, *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978), and its California progeny require an evidentiary hearing to protect both Dr. Benzeevi's Fourth Amendment rights and the judicial process. For example:

- The affidavit ignores the Master Services Agreement ("MSA"), a binding contract

between HCCA and the District in place since 2014 that legally authorized HCCA to take any amounts owed by the District—including the funds that the State now mischaracterizes as "stolen." While the State obviously had access to the MSA, it failed to advise this Court about its contents.

- Relatedly, the affidavit repeatedly suggests that the Tulare Asset Management ("TAM") bank account was Dr. Benzeevi's personal account, when documents in the State's possession state the contrary—*i.e.*, the TAM account is owned by HCCA and is authorized to receive District deposits as outlined in the MSA. The State incorrectly suggests that there was something improper about Celtic loan proceeds being deposited directly into the TAM account. In fact, the TAM account was set up pursuant to the MSA for the express purpose of receiving hospital funds. The MSA authorized HCCA to "sweep" all hospital revenues or other funds into the TAM account. The affidavit omitted this critical information.
- The affidavit misrepresents the District's Resolution 852, which authorized practically every aspect of the conduct that the State now characterizes as criminal. While the State's affidavit suggests otherwise, Resolution 852 expressly authorized Dr. Benzeevi to execute loan documents on behalf of the District to fund District operations, such as the work of HCCA, including by using District property as collateral. Resolution 852 is a one-page document, and the State clearly knew and understood its contents when submitting the affidavit.

An evidentiary hearing would be warranted to investigate these and other critical misrepresentations and omissions in the affidavit, if the seized property is not summarily returned to Dr. Benzeevi.

Thus, while the Court should grant Dr. Benzeevi's motion based on the papers and argument of counsel at the upcoming hearing on November 9, if it chooses not to do so, a factual hearing is required.

II. ARGUMENT

A. The State must prove by a preponderance of the evidence that the seized accounts are "stolen or embezzled" property.

On a motion for return of seized property, "[t]he People would be required to prove the property was stolen by a preponderance of the evidence, as in all determinations of ownership." *McGraw*, 100 Cal. App. 3d at 159. As stated in *Ensoniq Corporation v. Superior Court*, the case cited by the State:

> We find that due process requires the People to prove by a preponderance of the evidence that the seized property was stolen or embezzled, in a situation where no charges are pending and no conviction has been obtained. Although it may be suspected that the seized property was stolen, that fact must be proven by due process of law.

65 Cal. App. 4th 1537, 1549 (1998). This requirement is informed, in part, by due process and by the presumption of innocence, which is enshrined in the United States Constitution and in California Penal Code § 1096. It is also prescribed by Evidence Code § 637, which states: "The things which a person possesses are presumed to be owned by him." *See McGraw*, 100 Cal. App. 3d at 159; *Ensoniq*, 65 Cal. App. 4th at 1549. Accordingly, the burden of proof lies squarely with the State.

Recognizing that it cannot meet this burden here, the State contends, without support, that Dr. Benzeevi "is not entitled to any presumption that the funds in his account are the proceeds of legitimate activity once it has been established that the account received unlawfully obtained funds." Supp. Opp.[1] at 4. But Evidence Code § 637 says precisely the opposite. Section 637 provides that the money in Dr. Benzeevi's bank accounts is presumed to be owned by him. Similarly, Penal Code § 1524, which authorized the search warrant at issue here, permits a seizure "[w]hen the property was stolen or embezzled." In other words, the ***seized property itself*** must be stolen or embezzled; it is not sufficient to show that other, related property in the same bank account may have been stolen or embezzled—which is what the State seeks to do here.

Accordingly, the State must prove by a preponderance of the evidence that the money it

[1] "Supp. Opp." refers to the State's Supplemental Points and Authorities Regarding Evidentiary Hearing for Motion to Return Property, filed on October 19, 2018.

seized was "stolen or embezzled."

B. The State cannot meet its burden because the money it seized is not traceable to a crime.

It is not logically possible for the State to trace the seized funds to the alleged crime. As laid out in Dr. Benzeevi's opening brief, while the State may contend that a portion of the September 2017 deposit of [redacted] into Dr. Benzeevi's bank account constituted Celtic loan proceeds, the account already contained [redacted] in other funds, and later received [redacted] in additional funds. Mot. at 7 & Declaration of J. Duross O'Bryan In Support of Motion of Dr. Yorai Benzeevi for Return of Seized Property and Related Evidentiary Hearing ("Duross Decl.") at ¶ 29 and Attachment 12. In light of the burden of proof and the presumption that Dr. Benzeevi owns the money in his bank account, there is no basis in accounting or logic to conclude that the [redacted] remaining in the account in August 2018—eleven months after the deposit in question—was Celtic money. *Id.*

To address this obvious problem with the seizure, the State invokes inapposite case law. It relies primarily on federal post-conviction forfeiture statutes or challenges to convictions under federal statutes.[2] These cases say nothing about the pre-indictment seizure of property pursuant to a search warrant authorized by California Penal Code § 1524—when the target of the search warrant is presumed innocent and presumed to own the seized funds. *See* Cal. Penal Code § 1096 (presumption of innocence); Cal. Evid. Code § 637 (presumption of ownership). Nor is the State assisted by its sole California case, *People v. Mays*, which deals with a money-laundering statute. No California court has used or approved of a money-laundering analysis when analyzing whether assets are "stolen or embezzled" under § 1524. 148 Cal. App. 4th 13 (2007). There is no applicable case law to support the State's assertion that it may seize any money that resides in an allegedly tainted bank account when executing a search warrant. Instead, the relevant legal

[2] *United States v. Walsh*, 712 F.3d 119 (2d Cir. 2013) (civil forfeiture under 18 U.S.C. § 981); *United States v. Check No. 25128 in Amount of $58,654.11*, 122 F.3d 1263 (9th Cir. 1997) (forfeiture action under 18 U.S.C. § 881); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997), *as amended on grant of reh'g* (June 4, 1997) (overturning a conviction under 18 U.S.C. § 1957 and discussing 18 U.S.C. § 1956); *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986) (forfeiture under 18 U.S.C. § 881(a)(6)); *United States v. Real Prop. Located at 6415 N. Harrison Ave.*, No. 1:11-cv-0304-OWW-SKO, 2011 WL 2580335 (E.D. Cal. June 28, 2011) (in rem forfeiture action under 18 U.S.C. § 981).

standards—which place the burden of proof on the State and presume ownership by Dr. Benzeevi—contradict the State's assertion.

Because the State cannot satisfy its burden of proof by a preponderance that the seized funds were stolen or embezzled, the Court need not conduct a hearing to grant Dr. Benzeevi's Motion and return to him the funds seized from his Chase bank account.

C. If the Court does not grant Dr. Benzeevi's Motion on the papers, he has a non-discretionary entitlement to an evidentiary hearing.

Should this Court decline to grant Dr. Benzeevi's Motion on the papers, this Court must hold an evidentiary hearing to determine whether the seized funds are proceeds of a crime. "Due process requires that the determination of whether the seized property is stolen must be the result of a fair hearing." *McGraw*, 100 Cal. App. 3d at 159; *see also Modern Loan Co. v. Police Ct. of the City & Cty. of San Francisco*, 12 Cal. App. 582, 585 (1910). Indeed, the State itself emphatically agrees about the need for a hearing. And where, as here, the People "fail in their burden of proving the property to be stolen, then the property must be returned to [the persons from whom the property was seized]." *Ensoniq*, 65 Cal. App. 3d at 1550 (quoting *McGraw*, 100 Cal. App. 3d at 159–60).

D. The recently-obtained Chase Warrant affidavit provides an independent basis for an evidentiary hearing.

Now that the State has produced a redacted version of the search warrant affidavit, serious questions have arisen as to whether the State either intentionally or recklessly submitted a misleading affidavit to this Court to secure the warrant. The Fourth Amendment requires that a hearing be held where a defendant makes a preliminary showing that a false statement, "necessary to the finding of probable cause," was made "knowingly and intentionally, or with reckless disregard for the truth," by the affiant in the search warrant affidavit. *Franks*, 438 U.S. at 155–56; *People v. Benjamin*, 77 Cal. App. 4th 264, 267–68 (1999), *as modified* (Dec. 8, 1999) (same). An affidavit may also be insufficient when it omits facts adverse to the warrant application that "significantly distort[] the probable cause analysis" or render the affidavit "substantially misleading." *People v. Kurland*, 28 Cal.3d 376, 384–85 (1980); *see also Cty. of Contra Costa v. Humore, Inc.*, 45 Cal. App. 4th 1335, 1350 (1996). A defendant is entitled to a *Franks* hearing

when he a) specifies the portion of the affidavit that is claimed to be false, b) gives an "offer of proof" supporting the alleged misstatement, and c) establishes that the affidavit is insufficient to establish probable cause when the offending material is set to the side. *Franks*, 438 U.S. at 171–72. Dr. Benzeevi can make such a showing and is entitled to an evidentiary hearing on the matter.

The Chase Warrant affidavit is replete with false and misleading statements and omissions made at least with reckless disregard for the truth. The chart attached as Attachment 1 to this brief identifies at least ten critical false and misleading statements in the affidavit and describes and cites to the evidence that refutes each such statement. Attachment 1 constitutes Dr. Benzeevi's proffer that entitles him to an evidentiary hearing under *Franks v. Delaware* and the related California precedents. *E.g.*, *Kurland*, 28 Cal.3d at 384. Those misstatements and omissions are described, in brief, below.

The affidavit tells a false story in which Dr. Benzeevi and HCCA never received Board authorization to execute any loan on behalf of the District or to use hospital property to secure the loan. It goes on to misleadingly suggest that whatever authorization HCCA and Dr. Benzeevi did receive was rescinded by some duly authorized Board action taken by Board member-elect Senovia Gutierrez and Board members Jamaica and Northcraft. The affidavit then asserts that HCCA misrepresented its authorization to Celtic to obtain the loan, and once the Celtic money was received, Dr. Benzeevi simply took it with no legal authorization. Specifically, the affidavit suggests that it was improper for Celtic loan proceeds to be deposited into the TAM account, which the affidavit describes as Dr. Benzeevi's "personal account." The affidavit concludes with the assertion that the Celtic loan proceeds "did not benefit the hospital in any manner." Supplemental Declaration of Bevan A. Dowd in Support of Notice of Motion and Motion of Dr. Yorai Benzeevi for Return of Seized Property and Related Evidentiary Hearing ("Suppl. Dowd Decl."), Ex. 21 [Statement of Probable Cause] at 13, lines 19-21.

Practically every aspect of this story is either false or misleading. Most glaringly, the affidavit omits key details about the MSA between HCCA and the District. Per the MSA, the District agreed to pay HCCA to operate the District's hospital. That agreement gave HCCA full

control of the District's operating funds and accounts and authorized HCCA to use any District funds to pay HCCA any amounts owed by the District. Specifically, the MSA authorized the creation of a "Depository Account" to hold all District revenues:

> The District shall cause all amounts received by or on behalf of the District in connection with the operation, maintenance, or ownership of the Hospital and the Clinics and Other Facilities . . . to be deposited in the Depository Accounts.

Declaration of Bevan A. Dowd in Support of Notice of Motion and Motion of Dr. Yorai Benzeevi for Return of Seized Property and Related Evidentiary Hearing ("Dowd Decl."), Ex. 2 [MSA] § 4(g)(i). Those funds would then be swept into a "Master Account," which is also referred to as the TAM Account, over which HCCA had exclusive control:

> The District shall provide disposition instructions to the [bank] to transfer . . . all amounts in the Depository Account . . . into a bank account controlled by Manager [HCCA].

Id. at § 4(g)(iii). HCCA was further authorized to pay itself from the Master Account any amounts that the District owed HCCA:

> Manager [HCCA] is hereby authorized to make payment from the Master Account or other accounts of the District, including the Depository Account, to itself and its Affiliates of any amounts due to it or any of them by the District under this Agreement or otherwise.

Id. at § 4(g)(v). These provisions, which the affidavit ignores, are critical to understanding why HCCA and Dr. Benzeevi were legally authorized—and not stealing—when they used District funds to pay HCCA.

For instance, the affidavit both implicitly and explicitly describes the TAM account, where the Celtic loan proceeds were initially deposited, as Dr. Benzeevi's "personal account"—rather than an official account, set up pursuant to the MSA, for receipt of hospital funds that could be used by HCCA to pay for hospital operations, including payments of any amounts that the District owed HCCA. The affidavit states that Celtic loan proceeds "went directly into Dr. Benzeevi's bank accounts." Suppl. Dowd Decl., Ex. 21 at 13, lines 19-21. But far from being Dr. Benzeevi's personal account, the TAM account was the "Master Account" set up in the MSA for receipt of hospital funds. *See* Dowd Decl., Ex. 2 at § 4(g)(i). The affidavit also states that "[t]he contract with Celtic was a loan to TRMC, however the money was wired directly to an account owned by HCCA." Suppl. Dowd Decl., Ex. 21 at 7, ¶ 5. The clear implication is that it

was improper for Celtic funds (*i.e.*, hospital funds) to be deposited into the TAM account. But the affidavit omits that MSA authorizes HCCA to place ***all*** hospital funds into the TAM account. *See* Dowd Decl., Ex. 2 at § 4(g)(i).

Of equal significance, the affidavit does not apprise the Court of the amounts that the District owed HCCA at the time of the Celtic loan. As explained in detail in the declaration of accountant Duross O'Bryan, at that time the District's indebtedness to HCCA exceeded the entire [redacted] that HCCA received from the Celtic loan proceeds. O'Bryan Decl., ¶ 24. That money had been loaned from HCCA to the District to keep the hospital's doors open. Thus, HCCA was merely paying itself amounts that were properly and lawfully due to it under the explicit terms of the MSA.

But in addition to omitting this critical context, the story that the affidavit does tell is false and misleading. For instance, the District Board, per Resolution 852, gave Dr. Benzeevi and HCCA full authority to execute a loan on behalf of the District, to use the loan to pay hospital operating expenses (such as District legal fees and HCCA fees), and to secure the loan with hospital property:

> [T]he Board has determined…to have its manager…("HCCA"), acting through its Chairman Benny Benzeevi, M.D. ("Authorized Representative") seek to obtain a loan for the purposes of payment of operating expenses of the Hospital, repayment of debt…and for other Hospital purposes.
>
> …
>
> [T]he Authorized Representative is authorized and directed to take any further actions to execute, in the name of and on behalf of the District, any instruments and documents required by the lender to obtain such loan…, it being the intention of the Board that the Authorized Representative shall have absolute, full and complete power and authority to execute and deliver to the lender any and all documents and instruments required to obtain and consummate such loan….
>
> …
>
> [T]he Board acknowledges and agrees that…all property…and other assets of the District may be used as security for any loan obtained pursuant to this Resolution.

Dowd Decl., Ex. 6 [Res. 852], ¶¶ 2, 4–5. Resolution 852 was a one-page document, which was discussed in the affidavit. Suppl. Dowd Decl., Ex. 21 at 8–9, ¶ 6. It is inconceivable that the affiant did not read or understand this unambiguous language. Nevertheless, the affidavit repeatedly mischaracterizes this Resolution. For instance, the affidavit states that:

> Board members in favor of this resolution said their understanding was that HCCA was to find and present loan options to the board for consideration and not to actually procure the loans without final authorization of the board.

Id. at 8-9 at ¶ 6. But the express language of the resolution authorizes Dr. Benzeevi to "execute…any instruments and documents required by the lender to obtain such loan." Dowd Decl., Ex. 6 ¶ 4. Similarly, the affidavit states that "[the] resolutions [851 and 852] do not authorize any borrowed funds to go directly to HCCA." Suppl. Dowd Decl., Ex. 21 at 9, ¶ 6. But Resolution 852 authorizes the loan proceeds to pay "operating expenses," and "debt"—which is exactly what the funds that went to HCCA were used to pay. Additionally, the affiant states that:

> I am aware that Dr. Benzeevi obtained a $3 million loan from Celtic Leasing in a purchase/lease agreement under false pretenses in that this agreement was against TLHCD/TRMC assets and without the TLHCD board's knowledge or authorization.

Id. at 13, lines 16-19. But Resolution 852 clearly authorizes a loan against "all property…and other assets of the District." Dowd Decl., Ex. 6 ¶ 5. These misrepresentations of Resolution 852 were either reckless, intentional, or both.

The affidavit is equally misleading when it suggests that Resolution 852 was rescinded before the Celtic loan was executed. In fact there was no such rescission, as a careful reading of the affidavit demonstrates. The affidavit effectively concedes that at the July 27, 2017 meeting, Board Member-elect Gutierrez and Members Jamaica and Northcraft were unable to rescind Resolution 852 because they lacked a quorum and because Ms. Gutierrez had not yet been seated. *See* Suppl. Dowd Decl., Ex. 21 at 9–10, ¶ 10. With respect to the August 23, 2017 meeting, the affidavit misleadingly states that "Northcraft, Jamaica, and Guttierez . . . again announce that HCCA is not authorized to obtain loans on behalf of TRMC," but a review of the videotape of the meeting confirms that no formal Board action was taken at this meeting. Suppl. Dowd Decl., Ex. 21 at 10 ¶ 11; *see also* Valley Voice (@ourvalleyvoice), Facebook (Aug. 23, 2017, 5:08 p.m.), https://www.facebook.com/ourvalleyvoice/videos/1483257068377334/. Accordingly, Resolution 852 was in full force and effect at the time of the Celtic loan.

Moreover, the State does not disclose to this Court that it previously filed Petitions for Quo Warranto and a Writ of Mandate to compel the Board to recognize Ms. Gutierrez as a Board member. Dowd Decl., Exs. 8 & 14. As Dr. Benzeevi outlined in his opening brief, Judge

Melinda Reed declined to make any such ruling and dismissed the actions. Dowd Decl., Ex. 16 at 32:25–33:16. The State conveniently omitted that Judge Reed, in ruling on these petitions in September 2017, agreed that the meetings held by the Gutierrez and Members Jamaica and Northcraft were "not necessarily valid" because the "necessary declaration" to seat Gutierrez in office had not yet occurred. *Id.* at 23:10–14.

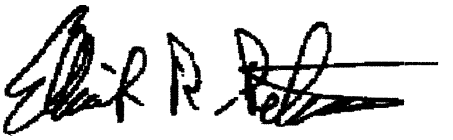
In short, Resolution 852 conferred complete legal authority to Dr. Benzeevi and HCCA to execute the Celtic loan and to use its proceeds to pay debt owed by the District to HCCA. Additionally, once HCCA received the loan proceeds, it was authorized to pay itself with those funds per the MSA. The State's search warrant application—which omitted these key facts and misleadingly suggested otherwise—asserted that Dr. Benzeevi committed a crime, when in fact, his actions were legally authorized by contract and Board resolution. Judge Reed's commentary underscores that Dr. Benzeevi's authority remained intact at the time. *See id.* at 23:10–14. A *Franks* hearing is therefore warranted to address the false and misleading nature of the affidavit.

III. CONCLUSION

Evidence will ultimately prove that this case has become overly politicized and that the State has listened to and presented only one side of a long-standing, hotly disputed political battle at the District—to the prejudice of HCCA, Dr. Benzeevi, and the interests of justice. For the reasons outlined above, this Court should grant Dr. Benzeevi's Motion or, in the alternative, order an evidentiary hearing at which the State bears the burden to establish by a preponderance of the evidence that the seized funds are proceeds of a crime and at which the State is ordered to justify and explain the misleading statements and critical omissions in the affidavit.

Dated: October 26, 2018

KEKER, VAN NEST & PETERS LLP

By: 

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ATTACHMENT A

SURREPLY OF DR. YORAI BENZEEVI RE MOTION FOR RETURN OF SEIZED PROPERTY AND RELATED EVIDENTIARY HEARING

Statement Number	Statement in Affidavit	Offer of Proof
1	"Celtic Leasing Corp. was not aware the Tulare Asset Management Account was owned by HCCA and not by TLHCD." Suppl. Dowd Decl., Ex. 21 (SPC) at 7, ¶ 4. "The Contract with Celtic was a loan to TRMC, however the money was wired directly to an account owned by HCCA. Representatives of Celtic would not have gone through with the transfer of funds had they known the account was not a TRMC account." *Id.* at 7, ¶ 5.	These statements misrepresent the nature of the Tulare Asset Management Account and the relationship between HCCA and the District. The Tulare Asset Management ("TAM") Account was an HCCA-owned account that was used for hospital operations. *See* O'Bryan Decl., ¶ 21, Attachment 8, Attachment 10.A. The MSA provided that hospital funds would be deposited into a "Master Account"—i.e., the TAM account—for official hospital operations: > The District shall provide disposition instructions to the Depository to transfer . . . all amounts in the Depository Account . . . into a bank account controlled by Manager (the '**Master Account**'). Dowd Decl., Ex. 2 (MSA) at § 4(g)(iii). Account ownership was irrelevant because the MSA gave HCCA both: (a) access to and control of all hospital funds (*see* MSA, §4(g)(iii), *supra*), and (b) the right to control and pay itself from any hospital operating account—whether owned by HCCA or the District: > Manager [HCCA] is hereby authorized to make payment from the Master Account or other accounts of the District, including the Depository Account, to itself and its Affiliates of any amounts due to it or any of them by the District under this Agreement or otherwise. *Id.* at § 4(g)(v). In fact, the District was not permitted to exercise any control over the hospital operating accounts after funds had been deposited: > Except for the transfers to the Master Account and Bond payments, the District shall not remove, disburse, transfer, use, pledge, hypothecate, grant a lien on or security interest in, or otherwise encumber any funds in the Depository Accounts or Master Account. *Id.* at § 4(g)(iii).

Statement Number	Statement in Affidavit	Offer of Proof
		HCCA's control of the hospital operating accounts was a material aspect of the MSA, such that any revocation of that control would constitute a default under the contract: > The foregoing instructions of the District with respect to the Government Depository Account shall be revocable, at the sole instruction of the District, to the extent required by applicable Law; provided, however, that if the District revokes such instructions, it shall be in material default of this Agreement and Manager [HCCA] shall, in addition to all other rights hereunder, be entitled to seek an order or judgment from a court of proper jurisdiction for specific performance to sweep the Governmental Depository Account pursuant to this Agreement. *Id.* at § 4(g)(i)(2). The State was in possession of the MSA, and it is a critical document in that it defined the relationship between HCCA and the District. Investigator Klassen therefore either knew or should have known that this focus on account ownership was misleading.
2	"Board members in favor of this resolution [Resolution 852] said their understanding was that HCCA was to find and present loan options to the board for consideration and not to actually procure the loans without final authorization of the board." Suppl. Dowd Decl., Ex. 21 at 8-9, ¶ 6.	This statement is misleading and contrary to the plain text of Resolution 852, which gave final authorization to Dr. Benzeevi to procure a loan without further board authorization: > **FURTHER RESOLVED**, that if a loan commitment is obtained, the Authorized Representative [Dr. Benzeevi] is authorized and directed to take any further actions and to execute, in the name of and on behalf of the District, any instruments and documents required by the lender to obtain such loan, including, without limitation, promissory notes, security instruments and other customary loan documents (which includes sale/leaseback documents which are used for financing purposes), it being the intention of the Board that the Authorized Representative [Dr. Benzeevi] shall have absolute, full and complete power and authority to execute and deliver to the lender any and all documents and instruments required to obtain and

Statement Number	Statement in Affidavit	Offer of Proof
		consummate such loan, and to take any further actions required to obtain and consummate such loan. Dowd Decl., Ex. 6 at 1. Resolution 852 also gave Dr. Benzeevi authority to execute a loan up to $22,000,000—an amount far above the $3,000,000 Celtic loan: **NOW, THEREFORE, BE IT RESOLVED THAT** the District's Authorized Representative [Dr. Benzeevi] is authorized and directed to prepare, execute and submit to potential lenders applications for a commitment to make a loan, or other agreement for the extension of credit to the District, in an amount of up to $22,000,000, upon such terms and at such interest rate as the District's Authorized Representative [Dr. Benzeevi] determines to be fair and consistent with the marketplace for the purposes stated above. *Id.*
3	"These resolutions do not authorize any borrowed funds to go directly to HCCA." Suppl. Dowd Decl., Ex. 21 at 9, ¶ 6.	This statement is false and misleading. As discussed above, the MSA authorizes all hospital funds to be directed to HCCA accounts. *See supra* Statement 1. The Celtic loan proceeds were first deposited into the TAM account, an HCCA-owned account used for hospital operations. *See* O'Bryan Decl., ¶ 21, Attachment 8, Attachment 10.A. Resolution 852 authorizes Dr. Benzeevi to borrow funds to be used for the repayment of debts: **WHEREAS**, the Board has determined that it is necessary and appropriate, and in the best interests of the District, to have its manager, Healthcare Conglomerate Associates, LLC ('HCCA'), acting through its Chairman, Benny Benzeevi, M.D. ('Authorized Representative') seek to obtain a loan for the purposes of payment of operating expenses of the Hospital, repayment of debt, payment of ongoing costs of construction of the Tower project, and for other Hospital purposes.

Statement Number	Statement in Affidavit	Offer of Proof
		Dowd Decl., Ex. 6 at 1. Paying HCCA is an operating expense of the hospital, as HCCA operates the hospital. Dowd Decl., Ex. 2 (MSA) at Recitals ("**WHEREAS**, the District desires to engage Manager [HCCA], and Manager [HCCA] desires to be engaged, to manage the operations of the District upon the terms set forth in this Agreement." If HCCA were not paid, the hospital could not remain open. *See* O'Bryan Decl. ¶ 9 (describing the District's financial troubles prior to HCCA's involvement). Moreover, the statement neglects to mention that the MSA authorized HCCA to use hospital funds to pay amounts owed to HCCA: > Manager [HCCA] is hereby authorized to make payment from the Master Account or other accounts of the District, including the Depository Account, to itself and its Affiliates of any amounts due to it or any of them by the District under this Agreement or otherwise, including, without limitation, the Management Fee, and the reimbursement of expenses and advances, and the District acknowledges that any amounts due to Manager [HCCA] or any of its Affiliates under this Agreement, including, without limitation, any Management Fee, shall be of at least as senior a priority as, and shall not be subordinate to the payment of, any amount due to any other creditor of Company, unless otherwise agreed to in writing by Manager . . . ." Dowd Decl., Ex. 2 at § 4(g)(v). At the time of the Celtic loan, the District owed HCCA more than $2.5M. O'Bryan Decl., ¶ 24. Therefore, HCCA was authorized to transfer $2.4M to its account to pay outstanding debts. *See* Dowd Decl., Ex. 2 at § 4(g)(v) (conferring authority to HCCA to pay itself outstanding loans).
4	"The next regularly scheduled board meeting is set for August 23, 2017 at 4:00PM…Northcraft, Jamaica	The statement misleadingly suggests that on August 23, 2017, there was a duly authorized board meeting at which Resolutions 851 and 852 were rescinded. Putting aside the question of whether this was a duly authorized board meeting—which is disputed, *see* 9/20/2018 Motion for Return of Seized Property at 8–10—the

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	and Gutierrez hold the board meeting and again announced that HCCA is not authorized to obtain loans on behalf of TRMC." Suppl. Dowd Decl., Ex. 21 at 10, ¶ 11.	three individuals present did not even purport to take any formal action, such as vote, at the meeting. *See* video of August 23, 2017 meeting during which there was no effort to take a formal action, much less rescind Resolutions 851 and 852.[1] Assistant Deputy Attorney Trevor Holly—the same prosecutor pursuing this investigation against Dr. Benzeevi—brought various civil actions seeking to compel the Board to recognize Ms. Gutierrez as a Board member. *E.g.*, Dowd Decl. Ex. 8 [Sept. 11, 2017 Petition for Alternative Writ of Mandate], Ex. 14 [Petition for Quo Warranto], Ex. 15 [Ex Parte Application for TRO]. In bringing these lawsuits, the State acknowledged that Ms. Gutierrez was not yet formally seated in office: > In denying and delaying Ms. Gutierrez her seat, the RESPONDENTS have unlawfully denied SENOVIA GUTIERREZ the right to her elected office, as well as subverted the democratic decision of the Citizens of Tulare County. Dowd Decl., Ex. 8 at 3. Judge Melinda Reed denied and dismissed the various civil actions. Dowd Decl., Ex. 16 at 32:25–33:16. She also specifically agreed that the actions taken by Ms. Gutierrez and Board members Northcraft and Jamaica were not "necessarily valid": 10 THE COURT: My question to you in that regard 11 is it's no secret that they have tried to have two 12 special meetings between August and now that I agree 13 are not necessarily valid because of the necessary 14 declaration not yet having taken place. They want to Dowd Decl., Ex. 8 at 23:10–14.

[1] This video can be found at Valley Voice (@ourvalleyvoice), Facebook (Aug. 23, 2017, 5:08 p.m.), https://www.facebook.com/ourvalleyvoice/videos/1483257068377334/. A DVD of the video will be made available at the hearing.

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5	"Each of the accounts listed had funds in the account prior to money from the Celtic loan being transferred in. Using acceptable accounting practices, once the pre-existing funds are removed from the account the remaining funds are considered to be part of the illegal funds." Suppl. Dowd Decl., Ex. 21 at 11, ¶ 8.	This statement misleadingly omits the [redacted] that was deposited in the [redacted] (Dr. Benzeevi's personal account) ***after*** Celtic loan proceeds were purportedly deposited into the account. O'Bryan Decl., ¶ 33(a). More importantly, there are no "acceptable accounting practices" that permit the conclusion that "the remaining funds are considered to be part of the illegal funds": > [T]he Celtic loan proceeds contained in Dr. Benzeevi's [redacted] account cannot be specially identified with any reasonable professional certainty due to substantial mixing of funds with other unrelated, non-Celtic loan funds. O'Bryan Decl., ¶ 35.
6	"This [Celtic loan] contract was negotiated fraudulently with intent to misrepresent authorization and circumstances to Celtic Leasing." Suppl. Dowd Decl., Ex. 21 at 12, lines 3-4.	This statement is false and lacks any support. Investigator Klassen does not even identify what the basis is for his statement that the contract was negotiated fraudulently with intent to misrepresent authorization and circumstances. At the least, HCCA provided Celtic with an opinion of counsel that included in detail the circumstances at the time and concluded that the loan was duly authorized: > Based upon Resolution No. 852 of the Lessee, which was adopted by the Board of Directors of the Lessee on June 20, 2017 . . . the Lease, including the lease of the property subject thereto and Lessee's obligations thereunder, has been duly authorized, approved, executed and delivered by and on behalf of the Lessee and is a valid and binding contract of Lessee, enforceable against Lessee in accordance with its terms. *See* Suppl. Dowd Decl., Ex. 22 at 2 (Baker & Hostetler opinion letter) *see generally* Dowd Decl., Ex. 11 (opinion letter from Michael Allan stating that Senovia Gutierrez was not officially in office, so none of her actions had binding effect on the District). There is no evidence, and Investigator Klassen cites none, suggesting that HCCA or Dr. Benzeevi lacked a good faith belief in this opinion of counsel. Celtic knew that the money could be used to pay outstanding loans. Resolution 852

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		stated that the funds could be used for "repayment of debt," as well as other uses: **WHEREAS**, the Board has determined that it is necessary and appropriate, and in the best interests of the District, to have its manager, Healthcare Conglomerate Associates, LLC ('HCCA'), acting through its Chairman, Benny Benzeevi, M.D. ('Authorized Representative') seek to obtain a loan for the purposes of payment of operating expenses of the Hospital, repayment of debt, payment of ongoing costs of construction of the Tower project, and for other Hospital purposes. Dowd Decl., Ex. 6 at 1.
7	"Due to this misrepresentation Celtic Leasing transferred the funds of this contract into an HCCA/Dr. Benzeevi owned bank account which they would not have done otherwise." Suppl. Dowd Decl., Ex. 21 at 12, lines 5-7.	*See* Statement No. 1 above.
8	"None of the funds from this transaction went to the benefit of TRMC and instead was used as a means of payment of legal fees for HCCA and into the personal account of Dr. Benzeevi." Suppl. Dowd Decl., Ex. 21 at 12, lines 7-9.	This statement is false and is contrary to other statements made in the affidavit itself. Indeed, 100% of the funds from the Celtic transaction went to the benefit of TRMC. The affidavit itself recognizes that $499,727.93 was used to pay the District's legal fees to Baker Hostetler. Suppl. Dowd Decl., Ex. 21 at 11, ¶ 5. These are the District's own operating expenses. The affidavit recognizes that a payment of $133,526 was made to Leasing Innovations Inc. for a $7M loan to the District. *Id.* at 7 lines 22–26. When that loan did not close, the District's lawyers have advised that this amount was directly refunded to the District. Approximately $2.4M was used to pay amounts legitimately owed by contract to HCCA:

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		As of August 31, 2017 . . . the resulting total amount of fees earned by HCCA of approximately ***$18,667,366*** less the total amount of case received by HCCA of ***$15,615,633*** (prior to receipt of the Celtic Loan proceeds), indicates that the District owed HCCA at least ***$2,538,423*** as of August 31, 2017. Accordingly, the entirety of the $2.4 million in Celtic Loan proceeds that HCCA received was used to pay the District's outstanding obligations to HCCA. O'Bryan Decl., ¶ 24. The repayment of these loans was for the District's operating expenses—that is, amounts owed to HCCA for operating the hospital. Indeed, the affidavit itself recognizes that at least $90,000 of Celtic money went toward the 9/29/2017 payment of $443,090.22. Suppl. Dowd Decl., Ex. 21 at 11, ¶ 8. This payment was used for a payroll payment to HCCA employees working at the hospital, a payment authorized by the MSA: Manager [HCCA] shall have the right to make disbursements from the Master Account, the Depository Account and other the [sic] District bank accounts, on behalf of the District in such amounts and at such times as the same are required to operate the Hospital and the Clinics and Other Facilities, as provided in Section 4(i) and to pay the expenses and debts incurred in connection therewith. Dowd Decl., Ex. 2 at § 4(g)(vii).
9	"I am aware that Dr. Benzeevi obtained a $3 million loan from Celtic Leasing in a purchase/lease agreement under false pretenses in that this agreement was against TLHCD/TRMC assets and without the TLHCD board's knowledge or authorization." Suppl. Dowd Decl., Ex. 21 at	This statement is false and misleading in at least two ways. First, Resolution 852 expressly authorized HCCA and Dr. Benzeevi to take a loan against TLHCD/TRMC assets: **FURTHER RESOLVED**, that the Board acknowledges and agrees that except to the extent prohibited by applicable law and any existing Bond documents, all property (real and personal), equipment, revenues, deposit accounts and other assets of the District

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	13, lines 16-19.	may be used as security for any loan obtained pursuant to this Resolution. Dowd Decl., Ex. 6 at 1. Additionally, Resolution 852 explicitly contemplates the use of an equipment leaseback as an aspect of the loan: **FURTHER RESOLVED**, that if a loan commitment is obtained, the Authorized Representative [Dr. Benzeevi] is authorized and directed to take any further actions and to execute, in the name of and on behalf of the District, any instruments and documents required by the lender to obtain such loan, including, without limitation, promissory notes, security instruments and other customary loan documents (which includes sale/leaseback documents which are used for financing purposes), it being the intention of the Board that the Authorized Representative [Dr. Benzeevi] shall have absolute, full and complete power and authority to execute and deliver to the lender any and all documents and instruments required to obtain and consummate such loan, and to take any further actions required to obtain and consummate such loan. *Id.* at 1. Second, the affidavit itself recognizes that Resolution 852 was not rescinded at the time of the Celtic loan. At the July 27, 2017 meeting, the affidavit effectively admits that Resolutions 851 and 852 were not rescinded because of concerns—raised by Bruce Greene—that "Gutierrez [was] not yet a legitimate board member and they had no quorum." Suppl. Dowd Decl., Ex. 21 at 9-10, ¶ 10. At the August 23, 2017 meeting, no formal action was taken. *See* Statement No. 4 above.
10	"I am further aware that the funds from this [Celtic] agreement went directly into Dr. Benzeevi's bank accounts and did not benefit the hospital	This statement is false in two ways. First, affidavit itself recognizes that no Celtic money went "directly" into Dr. Benzeevi's personal bank accounts. All Celtic money went first into the TAM account, which was an HCCA-owned account that was operated on behalf of the

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	in any manner." Suppl. Dowd Decl., Ex. 21 at 13, lines 19-21.	District. *See* Suppl. Dowd Decl., Ex. 21 at 11, ¶ 1 & O'Bryan Decl., ¶ 21, Attachment 8, Attachment 10.A . In any event, account ownership was irrelevant because the MSA gave HCCA control of any hospital operating account—whether owned by HCCA or the District: > Manager [HCCA] is hereby authorized to make payment from the Master Account or other accounts of the District, including the Depository Account, to itself and its Affiliates of any amounts due to it or any of them by the District under this Agreement or otherwise. Dowd Decl., Ex. 2 at § 4(g)(iii). *See also supra* Statement 1. Second, the entirety of the $3M in Celtic loan proceeds benefited the hospital in clear and straightforward ways—by paying the District's operating expenses, including payroll. *See* Statement No. 8 above.